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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CLYDE DAVID UMPHLETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DISTRICT

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Dated: April 30, 1984

30 pp

Questions Presented

1. Whether Petitioner's Sixth Amendment rights to trial by jury, to confrontation of witnesses against him, and to effective assistance of counsel and his Fifth Amendment rights to fundamental fairness and due process of law were violated when the District Court set aside a stipulation entered into by the Petitioner and the United States without the Court's giving the Petitioner notice of its intended action and an opportunity to withdraw his waiver of trial by jury and to present evidence and argument on the material issue to which the parties had stipulated.

2. Whether Revenue Sharing Funds (31 USC §§1221 *et seq.*) granted to a local government, once in that government's exclusive possession, constitute "money. . .of the United States" within the purview of 18 USC §641.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Clyde David Umphlett, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The opinion of the Fourth Circuit (App. A *infra,* pp. 1a-3a) has not yet been officially reported. The opinion of the district court (App. C *infra,* pp. 5a-17a) has not been reported.

Jurisdiction

The judgment of the Court of Appeals (App. A, *infra,* p.p. 1a-3a) was entered on February 28, 1984. A Petition for Rehearing was denied on April 2, 1984. (App. B, *infra,* p. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

1. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...; to be confronted with the witnesses against him; ...and to have the assistance of counsel for his defense.

2. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of...liberty,... without due process of law.

3. 18 U.S.C. §641 provides in relevant part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use...any record, voucher, money, or thing of value of the United States...
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both...

Statement

The Petitioner, Clyde David Umphlett, was indicted on August 4, 1982, in a six count indictment alleging the theft of monies of the United States in violation of 18 USC §641. He was acquitted of counts 2 through 6 after a non-jury trial and convicted of count one.

Count one alleged that the Petitioner, the duly elected Berkeley County Supervisor, used a county employee for personal business while the employee was being paid with county funds. The Trial Court found that in the fiscal year from July 1, 1978 to June 30, 1979, Federal Revenue Sharing Funds paid into the

Berkeley County general fund and mixed with monies from all revenue sources retained sufficient identity to continue to be "money. . .of the United States". These funds, which comprised thirteen (13%) percent of the total receipts of the Berkeley County general fund, were mixed with all funds received by the county from all revenue sources, both federal and non-federal, and then allocated to Berkeley County's Roads and Bridges Department by the County Council. The employee in question was an employee of the Roads and Bridges Department.

The Principal issue raised at trial was whether such funds were "money. . .of the United States" so as to confer federal jurisdiction under 18 U.S.C. §641. Counsel for the Petitioner and the Government agreed to certain stipulations of fact, and, in reliance on such stipulations of fact, the Petitioner waived his right to a jury trial.

The stipulation, executed by both parties, stated, in pertinent part:

> 4. During the years covered by the Indictment, there were no reimbursable funds received by the Roads and Bridges Department.
>
> 5. During the years covered by the Indictment, there were, in effect, no federal reporting requirements as to any funds allocated to the Berkeley County Roads and Bridges Department.

In its Order, the District Court found that:

> 20. The only year in question in the Indictment in which any federal funds were allocated to the Roads and Bridges Department was the fiscal year from July 1, 1978-June 30, 1979, covered by Count 1, in which funds from the Federal Revenue Sharing Program were allocated to and spent by that department.

The District Court determined that it was not bound by the stipulations of the parties (App. C, p. 13a, F.n. 3) and concluded that "the federal government exercises sufficient supervision and control over Federal Revenue Sharing Funds to bring those funds within the meaning of 'money. . .of the United States' as used in

18 U.S.C. §641." (App. C, p. 16a). That Court then found the Petitioner guilty of Count 1.

The Petitioner appealed his conviction to the United States Court of Appeals for the Fourth Circuit on the grounds that the stipulation should not have been disregarded by the District Court and that Federal Revenue Sharing Funds were not "money. . .of the United States" for purposes of 18 U.S.C. §641. The Court of Appeals affirmed the District Court (App. A, p. 1a). A Petition for Rehearing was denied by the same three-judge panel (App. B, p. 4a).

Reasons for Granting the Writ

1. *In upholding the District Court's decision to set aside the stipulation, the Court of Appeals has decided a federal question of substance in a way that conflicts with decisions of other federal courts of appeals on the same matter.* The record of this case reflects that, until Petitioner's counsel received a copy of the District Court's Order, neither Petitioner nor his counsel were aware that the District Court was not accepting the stipulation as filed. Even assuming that the District Court had discretion in determining whether to accept the stipulation, it owed a duty to Petitioner, who had waived his right to a trial by jury in reliance on the acceptance of the stipulation, to advise him of his discretion after the introduction of the stipulation and prior to the issuance of the Judgment of the Court. This the District Court failed to do.

In those cases where the district court has refused to enforce a stipulation, the trial judge has advised the defendant of his position during the trial and prior to Judgment, giving the defendant an opportunity to request a withdrawal of his waiver of jury trial and to restructure his defense in accordance with the ruling of the Court. Petitioner herein never had such an opportunity in that he was advised of the court's decision in the final Order of the court. If informed at or during the trial of the Court's decision regarding the stipulation, Petitioner may have requested that he be allowed to withdraw his waiver of jury trial and most certainly

would have structured his defense in a different fashion by presenting additional witnesses on the issues regarding the one bank account and the supervision and control of the Federal Revenue Sharing Funds. Such an opportunity was essential in order to ensure the Petitioner's Fifth Amendment right to due process and Sixth Amendment rights to a jury trial, confrontation of witnesses and effective assistance of counsel.

In the cases in which the Fourth Circuit has addressed the propriety of disregarding stipulations, that Court found two exceptions to the general rule that ". . . stipulations of attorneys made during a trial may not be disregarded or set aside at will." *Marshall v. Emersons, Ltd.*, 593 F. 2d 565, 568 (4th Cir. 1979). The two exceptions were set out by that Court as follows:

> It is true. . ."that a stipulation of counsel originally designed to expedite the trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice upon one of the contracting parties". . . It is also true that when a stipulation is entered into under a mistake of law, "trial courts may, in the exercise of a sound judicial discretion and in the furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings. . ." 593 F. 2d at 568.

The District Court in the present case made no such findings. In *Emersons,* the stipulation was disregarded by the District Court on motion of the Secretary of Labor prior to entry of judgment. The defendant therein had an opportunity to be heard.

In fact, counsel for Petitioner have been unable to find a case in which a court disregarded a stipulation with no notice to the affected party prior to the entry of judgment. In those cases where the stipulation has been set aside by the District Court, the Court has done so with notice to the defendant during the trial or, if after conclusion of the trial, the Court has reopened the trial for the purpose of taking additional testimony. Neither was done here.

In *United States v. Montgomery,* 620 F. 2d 753 (10th Cir. 1980), the Court of Appeals for the Tenth Circuit determined that

the District Court's decision to set aside a stipulation in a non-jury trial was proper. The District Court's decision came about in order "...to prevent a manifest injustice brought about by inadvertence on the part of the government..." 620 F. 2d at 757. The Court reopened the trial to receive evidence on an essential element of the government's case. The Defendant objected to reopening the matter, but he never requested withdrawal of the waiver of jury trial:

> The defendant did not request withdrawal of the waiver of jury trial and stipulation at the time that the court reopened the proceedings. He merely objected to reopening in a general way...Chief Judge Seth in the [companion] case states that a motion to withdraw the waiver would have been essential in order for the objection to be effective. 620 F. 2d at 757.

The Defendant did not attempt to withdraw his waiver, but he did have an opportunity to withdraw it, to present additional evidence and to confront the government's witnesses against him. The Petitioner in the present case had no such opportunity. He presented his case in reliance on the stipulation entered into by both parties.

In *United States v. McGregor,* 529 F. 2d 928 (9th Cir. 1976), the parties entered into a stipulation. During the trial, the judge informed the defendants that continued enforcement of the stipulation was dependent on defendants' being limited in their cross-examination of a witness on a particular issue. The defendants claimed their rights to confront witnesses were denied by the trial judge's restriction of cross-examination. However, as the Court of Appeals pointed out, the defendants were never prevented from asking the proposed questions. They had a choice of continued cross-examination or enforcement of the stipulation. The Court found that the District Court could have set aside the stipulation in that the government had entered into it by inadvertence, and the defendants would not be prejudiced or treated unfairly if the stipulation were set aside.

In the present case, the Petitioner was prejudiced by the

setting aside of the stipulation. In reliance on the stipulation, the Petitioner gave up his rights to a jury trial and to confront the government's witnesses on the supervision and control retained by the federal government over revenue sharing funds. The Petitioner never had an opportunity to prepare a defense to the facts as set forth in the Order of the District Court.

Therefore, the Petitioner's Fifth Amendment right to due process of law and Sixth Amendments rights to a trial by jury, to confront witnesses and to effective assistance of counsel were violated when the District Court chose to disregard the stipulation. There is no case that permits the rights of the Petitioner to be prejudiced in such a manner.

2. *No federal court has found that Federal Revenue Sharing Funds are "money...of the United States" for purposes of 18 U.S.C. §641.* The revenue sharing funds received by the Berkeley County Roads and Bridges Department were commingled with funds from other sources in one bank account.

United States v. Gibbs, 704 F. 2d 464 (9th Cir. 1983), is the most recent case dealing with the definition of "money...of the United States" for purposes of 18 U.S.C. §641. That Court found:

> When federal and nonfederal funds have been commingled, it is difficult to prove whether specific stolen dollars from that account are federal or nonfederal. We indicated [in a prior case] that the government's supervision and control of that money is the critical factor in determining the federal character of funds in a commingled account. 704 F. 2d at 466.

Other cases have held similarly. See *United States v. Mitchell,* 625 F. 2d 158 (7th Cir. 1980); *United States v. Evans,* 572 F. 2d 455 (5th Cir. 1978).

No case has held that Federal Revenue Sharing Funds fall within the purview of 18 U.S.C. §641. In fact, the cases that discuss the nature of these funds find little, if any, federal supervision and control over the funds once they are disbursed to local governments.

One need read only six lines of the legislative

> history of the State and Local Assistance Act of 1972 (Revenue Sharing Act) to see the phrase "no strings." *Goolsby v. Blumenthal,* 590 F. 2d 1369, 1370 (5th Cir. 1979).
>
> There is little dispute that the intent and objective of the Revenue Sharing Act was to return to the states and local communities revenues collected by the federal government so that the state and local governments could spend these funds according to their own perceived demands and objectives and not those of the federal government. This concept has been loosely referred to as a "no strings" approach to federal assistance... *Carolina Action v. Simon,* 389 F. Supp. 1244, 1248, aff'd 552 F. 2d 295 (4th Cir. 1975).

In both *Carolina Action* and *Goolsby,* the courts involved ruled that certain regulatory statutes did not apply to projects involving revenue sharing funds in that there were "no strings" on the use of these funds.

There is little, if any, supervision and control over the use of Federal Revenue Sharing Funds. The government conceded this issue at trial and made no attempt to prove otherwise. All cases discussing the nature of such funds hold that they have "no strings" attached.

Therefore, Federal Revenue Sharing Funds are not "money...of the United States" for purposes of 18 U.S.C. §641.

Conclusion

The Court of Appeals failed to follow the precedent set forth by every court that has faced the question of whether to disregard a stipulation. By affirming the District Court, the Court of Appeals denied the Petitioner's Fifth Amendment right to due process of law and his Sixth Amendment rights to a jury trial, to confrontation of witnesses on the federal funds issue and to effective assistance of counsel in reliance on the stipulation entered into in good faith by both parties. A substantial injustice has been done to the Petitioner. He has been denied his rights under the

Fifth and Sixth Amendments to the United States Constitution.

In addition, the Court of Appeals rendered a decision concerning the nature of Federal Revenue Sharing Funds that conflicts with all cases that have dealt with that issue.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5108

United States of America,

Appellee,

v.

Clyde David Umphlett,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Charles E. Simons, Jr., Chief District Judge. (CR 82-255)

Argued: January 13, 1984 Decided: February 28, 1984

Before WIDENER and HALL, *Circuit Judges;* and BUTZNER, *Senior Circuit Judge.*

Morris D. Rosen (Alice F. Paylor Fishburne, Rosen, Oberman & Rosen on brief) and Mark T. Tanenbaum for Appellant; William Howell Morrison, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney on brief) for Appellee.

Appendix A

Opinion of United States Court of Appeals

PER CURIAM:

Clyde David Umphlett appeals from his conviction by the district court of embezzling monies of the United States in violation of 18 U.S.C. §641.[1] We affirm.

Umphlett was indicted in August, 1982, for embezzling federal revenue sharing funds which had been allocated to the Roads and Bridges Department of Berkeley County, South Carolina. At trial, the evidence established that for two years Umphlett had used the services of a Berkeley County employee for his personal benefit. The employee was paid with monies budgeted through the Roads and Bridges Department. A percentage of these monies came from federal revenue sharing funds.

The parties stipulated that during the years covered by the indictment, there were (1) "no reimbursable funds received by Berkeley County for use by the Roads and Bridges Department," and (2) "no federal reporting requirements as to any funds allocated to the Berkeley County Roads and Bridges Department." The district court considered these stipulations and ruled that insofar as they conflicted with the applicable statutes and regulations the court would not be bound by them. In finding Umphlett guilty, the district court concluded that the applicable statutes and regulations provided ample evidence of federal supervision and control over federal revenue sharing funds and ruled that such funds were, therefore, monies of the United States for the purpose of prosecution under §641.

On appeal, Umphlett contends that the district court should have based its decision solely on the parties' stipulations. Umphlett also contends that the federal revenue sharing funds were not monies of the United States as contemplated by §641.

[1]Section 641 reads, in pertinent part: "Whoever embezzles . . . money . . . of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . ."

Upon consideration of the record, the briefs, and oral argument, we find Umphlett's contentions to be without merit. The pertinent statutes and regulations were properly considered by the district court. *Swift & Co. v. Hocking Valley Ry. Co.,* 243 U.S. 281, 289 (1917). In addition, the federal funds were monies of the United States for the reasons expressed by the district court. *United States v. Umphlett,* No. 82-255 (D. S.C. April 20, 1983). Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

Appendix B
Order of the United States Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5108

United States of America,

Appellee,

v.

Clyde David Umphlett,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Widener, Judge Hall and Judge Butzner.

For the Court,

/s/ William K. Slate, II

Clerk

FILED
April 2, 1984

Appendix C
Order of United States District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
Criminal Number 82-255

UNITED STATES OF AMERICA,

-versus- **ORDER**

CLYDE DAVID UMPHLETT,
Defendant.

In this criminal prosecution, the defendant, Clyde David Umphlett, was indicted on six counts, each alleging embezzlement of federal funds in violation of Title 18, United States Code, Section 641. The defendant waived his right to a jury trial, and the case was tried by the court.

The defendant offered no evidence challenging the allegations that he embezzled, stole and knowingly converted to his own use money to which he was not entitled. His only challenge was to whether the money embezzled belonged to the United States. The ownership of the embezzled funds is a critical issue in a §641 prosecution, for proof beyond a reasonable doubt that the money alleged to have been embezzled was "money. . .of the United States" is an essential element of such a charge. Without such proof for any given count of the Indictment the embezzlement charged in that count would be beyond the reach of §641 and would evade the federal court's power to punish.

After review of the evidence presented, the court finds that the prosecution has proved the following facts beyond a reasonable doubt:

Findings of Fact

1. At all times alleged in the Indictment the defendant was

the duly elected Supervisor of Berkeley County, South Carolina. By virtue of his office, the defendant had under his control various departments of county government, specifically including the Roads and Bridges Department of Berkeley County.

2. During the period from January 1, 1978, up to and including December 1, 1980, as alleged in Count 1, the defendant used for his personal benefit the services of Simon Houser, Jr., an employee of Berkeley County.[1] While Houser was working for the defendant, his salary was paid with funds budgeted through the Berkeley County Roads and Bridges Department. It was customary for Houser to report to work at the Berkeley County Roads and Bridges Department, and then to be taken by the defendant to the defendant's residence, where Houser would work for the remainder of the day. Houser also worked at the defendant's farm while he was on the Berkeley County payroll, and during the five years prior to November, 1981, Houser's work at the defendant's properties included such jobs as building two hog pens, laying concrete for various projects, cutting grass, splitting wood, and caring for animals. During the period from January 1, 1978 to November 30, 1980, Simon Houser was paid $27,391.91 in salary.

3. On July 20, 1979, as alleged in Count 2, the defendant received a load of concrete at his farm which was paid for with $586.56 in funds allocated to the Berkeley County Roads and Bridges Department. The concrete was used in the construction of an animal breeding barn on the defendant's property.

4. On June 15, 1980, as alleged in Count 3, the defendant received a shipment of lumber at his farm which was paid for with $1,549.80 in funds allocated to the Berkeley County Roads and Bridges Department. The lumber was purchased from Umphlett Lumber Company, a business owned by the defendant's brother,

[1]The evidence in fact demonstrated that the defendant had used the services of Houser while on county time for a period exceeding ten years and that other county employees had also been put to work on Umphlett's property at various unspecified times.

and was delivered to the defendant's property by county employees using county equipment. After the defendant learned that photographers were taking pictures of the lumber being unloaded at his farm, he directed that the unloading cease. The lumber was transported thereafter to the Berkeley County Maintenance Shop where it remained unused for appoximately one year. The lumber was used ultimately for county purposes.

5. In May and June of 1980, as alleged in Count 4, certain parts of a dragline owned by the defendant were repaired at the expense of Berkeley County. Columbia Crawler Corporation rebuilt the tracks of the dragline and submitted a bill for $6,944.15, dated June 16, 1980, which was paid with funds allocated to the Berkeley County Roads and Bridges Department.

6. On or about July 1, 1980, as alleged in Count 5, Berkeley County employees were required to build two hog trailers for the defendant at the Berkeley County Maintenance Shop. The county employees built the trailers on county time and used county equipment and supplies in constructing them. The cost of the materials used and the salaries of the county employees involved were paid with funds allocated to the Berkeley County Roads and Bridges Department.

7. On or about October 4, 1980, as alleged in Count 6, a farm tractor belonging to the defendant was repaired by Berkeley County employees using county equipment and supplies. The cost of the repair was approximately $1500.00 and was paid from funds allocated to the Berkeley County Roads and Bridges Department.

8. As reflected by individual Findings of Fact 2-7, in each of the acts of embezzlement described therein, the defendant appropriated to himself funds and/or property having a value in excess of $100.00. The defendant committed each of the acts of embezzlement within the District of South Carolina.

9. For each of the years in question in the Indictment, Berkeley County, South Carolina received federal funds from various sources.

10. In the fiscal year from July 1, 1977 through June 30, 1978, 27.6% of Berkeley County's budget had a federal source, 15.5% being federal revenue sharing funds, and 12.1% being other federal grants.

11. In the fiscal year July 1, 1978 through June 30, 1979, 33% of Berkeley County's budget had a federal source, 13% being federal revenue sharing funds and 20% being other grants.

12. In the fiscal year July 1, 1979 through June 30, 1980, 25.4% of Berkeley County's budget had a federal source, of which 13.6% were federal revenue sharing funds and 11.8% were specific grants.

13. In the fiscal year July 1, 1980 through June 30, 1981, 23% of Berkeley County's budget came from federal sources, 12.3% federal revenue sharing funds, and 10.7% being specific grants.

14. All revenues received by Berkeley County during the years covered by the Indictment, whether from a federal, state, or county source, were received by the County Treasurer and deposited in one general fund bank account, known as the Berkeley County General Fund.

15. Funds received by Berkeley County are deposited by subaccount divisions, with federal funds bearing subaccount number 300.

16. The Berkeley County budget prepared prior to the beginning of each fiscal year budgets all federal funds for various specific expenditures, both federal revenue sharing funds and specific grants.

17. After the Treasurer receives all funds they are allocated by source in the Berkeley County budget.

18. During the years covered by the Indictment, all disbursements made by Berkeley County were made by the Finance Director out of the Berkeley County General Fund. It was standard practice for the Fianance Director to post all disbursements as they were made on a computer maintained for that purpose, according to the department which spent the funds.

19. For the fiscal years covered in the Indictment, the audit conducted at the end of each fiscal year showed no federal funds being spent by any department to which they had not been allocated.

20. The only year in question in the Indictment in which any federal funds were allocated to the Roads and Bridges Department was the fiscal year from July 1, 1978-June 30, 1979, covered by Count 1, in which funds from the Federal Revenue Sharing Program were allocated to and spent by that department.

21. At all times covered by the Indictment, the defendant had control over expenditures from the Berkeley County Roads and Bridges Department account.

Conclusions of Law

1. Despite the clear evidence of repeated acts of embezzlement by the defendant, the prosecution's case for a conviction under 18 U.S.C. §641 is not without its problems. Both the government and the defense have rightly focused their energies and arguments on the central issue of whether the funds embezzled were "money of the United States." As noted previously, this point is an essential element in a §641 prosecution, and the burden is on the prosecution to prove it beyond a reasonable doubt.

The core of the prosecution's theory is that the comingling of funds with federal, state and county sources in the Berkeley County General Fund colors the entire General Fund with a federal character. Even though all of the defendant's defalcations were paid through the Roads and Bridges Department, to which funds from a federal source were budgeted in only one fiscal year, the prosecution argues that passage of funds from various sources through the General Fund "melting pot" left all funds with a federal character. Moreover, the prosecution urges that the Roads and Bridges Department overspent its budget in fiscal years covering all except the last count, and thereby temporarily usurped unspent funds in the General Fund account. The defense counters by pointing out that at the end of each fiscal year, there were no

shortages in departmental or program accounts to which federal funds had been budgeted. The prosecution's rejoinder is as follows:

> [S]ince on any given day one could not determine what funds were in the general fund, and since all monies were comingled in the general fund, the mere fact that all federal money is accounted for in some appropriate place at the end of the year is immaterial. The case at bar is analogous to the bank teller who embezzles funds in the morning, uses the money during the day, and returns the money in time to balance out at the end of the day. The crime of embezzlement occurred when the money was taken, no matter what later happened.

The government's analogy is not perfect. In fact, it begs the central question: "Whose money was embezzled?"

Neither prosecution nor defense has cited any authority accepting or rejecting the government's "tainting" theory, through which the entire Berkeley County General Fund would acquire a federal character for the purposes of §641. Instead, the cases cited by the parties and those revealed by the court's research have dealt with instances where particular program accounts were partially composed of federal funds, the remainder of the program's funding coming from some non-federal source or sources. In these cases, among which are *United States v. Evans,* 572 F. 2d 455 (5th Cir.), *cert. denied,* 439 U.S. 870 (1978); *United States v. Smith,* 596 F. 2d 662 (5th Cir. 1979); and *United States v. Mitchell,* 625 F. 2d 158 (7th Cir. 1980), the relevant inquiry for "federalness" in a mixed-source account has focused upon whether the federal government retained any significant property interest in the funds. The existence of a federal property interest has in turn been held to depend upon whether there was "substantial and sufficient federal supervision and control over the funds granted by the federal government to the [non-federal] program." *Mitchell,* 652 F. 2d at 161. Examples of such federal controls are requirements of recordkeeping, handling and reporting by the recipient, as well as the federal government's retention of power to reallocate funds. See *United States v. Maxwell,* 588 F. 2d 568 (7th Cir. 1978, *cert.*

denied, 444 U.S. 877 (1979).

None of the cases dealing with the identification of a federal property interest in mixed-source funds concerns a situation identical to the Berkeley County General Fund. Instead, the typical case has involved a distinct account, which although composed of funds from more than one source, had a more narrowly defined purpose then to serve as the bankroll for all county operations. By contrast, the General Fund's true nature is that of a pool of individual departmental accounts.

In this court's view, there are significant distinctions between the characteristics of the Berkeley County General Fund and those of the program accounts involved in the cases noted above. Chief among these distinctions is the difficulty of proving precisely when federal funds were present in the General Fund: With the distinct program accounts involved in such cases as *Mitchell, Evans,* and *Smith,* the courts have shown no difficulty with assuming that if federal funds as well as funds from other sources were paid to the program account in question, the federal funds must have been among the monies embezzled. The cases have not focused on whether federal funds were embezzled on a pro-rata basis, nor have the opinions discussed the precise timing of the entry and expenditure of the federal portion of mixed-source funds. The absence of such concerns is entirely reasonable when a distinct program account is involved, since once funds from mixed sources are poured into a program account, they ordinarily are comingled, and cease to be dintinguishable by source.

On the other hand, where a pool of program accounts such as the Berkeley County General Fund is involved in a §641 prosecution, it is this court's view that proof of the timing of entry and expenditure of federal funds becomes essential. In the instant case, the parties stipulated to the receipt by Berkeley County during the years in question of a range of federal grants. Assuming for the sake of argument that the federal government retained a property interest in these grants, it must still be realized that these federal grant funds remained in the General Fund only until they

were consumed by expenditure from the specific program accounts to which they had been allocated. It may be that some or all of the programs receiving federal grant funds had not depleted their individual budgets in the General Fund for that fiscal year at the points when the defendant embezzled funds. Thus, it may also be — and in fact seems very likely — that some amount of federal grant funds remained in the General Fund when each act of embezzlement was committed. The serious problem with this line of reasoning is that it fails to satisfy the government's burden of proof beyond a reasonable doubt.

Even assuming, as the government asks, that a General Fund could be colored with a federal character under §641 by the presence of federal grant money in one of the Fund's many constituent accounts, the government still must prove beyond a reasonable doubt that federal money was in the General Fund when the act of embezzlement occurred. It seems to this court that such proof must by necessity demonstrate that the federal grant funds both had been received and also had not been entirely expended from the General Fund at the time of embezzlement. Here, despite the strong likelihood that this was the case for most if not all counts, this court is without proof beyond a reasonable doubt of precisely when during the various fiscal years federal grand funds entered and left the Berkeley County General Fund.

Thus, while this court does not reject the government's basic theory that a General Fund may be colored by the presence of federal grants in its constituent program accounts, it considers the government's case here to lack the necessary proof beyond a reasonable doubt of *when* such federal funds were present in the Berkeley County General Fund.

2. The court's conclusion regarding the primary theory of the prosecution does not necessarily mean that this defendant, so clearly guilty of embezzlement, must be acquitted. The alternate theory of criminal liability to which the court now turns requires a brief recapitulation of the background of this case.

As recognized in the Findings of Fact set out above, during the fiscal year running from July 1, 1978 through June 30, 1979, Federal Revenue Sharing funds were allocated to and used by the Berkeley County Roads and Bridges Department. It was through the Roads and Bridges account that the defendant's acts of embezzlement were funded. Count One of the Indictment covers the fiscal year in which such Federal Revenue Sharing funds were used by the Roads and Bridges Department.

Neither the research of the parties nor of the court has uncovered any reported case in which a prosecution under 18 U.S.C. §641 has involved Federal Revenue Sharing funds. The defendant's able counsel has urged that this absence of caselaw is some indication that Federal Revenue Sharing funds are not a proper basis for a §641 prosecution, particularly since the use of Federal Revenue Sharing funds is not limited to particular projects specified by the federal government.[2] The defense contends that the broad latitude enjoyed by recipient governments in choosing how to spend Federal Revenue Sharing funds demonstrates the absence of that degree of supervision and control necessary to give the funds a continuing federal character for §641 purposes.[3]

After reviewing the provisions of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§1221, *et seq.*, the State and

[2]Until its repeal on October 13, 1976, effective with respect to Revenue Sharing entitlement periods beginning on or after January 1, 1977, 31 U.S.C. §1222 provided that Federal Revenue Sharing Funds could only be used for certain "priority expenditures," as defined in that section.

[3]The prosecution, for its part, has not emphasized the Revenue Sharing Funds theory, which would have been surplusage had the government prevailed on its broader General Fund theory. In fact, among the many stipulations entered into to expedite the trial, the government conceded that during the years covered by the indictment, there were (1) no reimbursable funds received by Berkeley County for use by the Roads and Bridges Department, and (2) no federal reporting requirements as to any funds allocated to the Roads and Bridges Department. The court does not consider itself bound by these stipulations insofar as they conflict with 31 U.S.C. §§1221 *et seq.* and with 31 C.F.R. §§51.1 *et seq.*

Local Fiscal Assistance Amendments of 1976, and the pertinent regulations, 31 C.F.R. 51.1 *et seq.*, this court concludes that there are ample indicia of federal supervision and control over Federal Revenue Sharing Funds to justify their being considered "monies of the United States" for the purpose of a prosecution under §641.

The removal by the 1976 Amendments of limitations on the categories of expenditures for which Federal Revenue Sharing Funds may be used is hardly the equivalent of a complete abdication of federal control. To the contrary, federal controls provided by the applicable statutes and regulations are extensive.

Section 1242 of Title 31 prohibits denial on the basis of race, color, national origin, sex, or improper consideration of religion, age or handicap of the benefits of any program operated by a governmental recipient of Federal Revenue Sharing Funds. Section 1244 of the same Title provides for private civil actions for such prohibited practices. *See also* 41 C.F.R. §§51.50-51.75.

Further evidence of federal retention of a proprietary interest in Revenue Sharing Funds in shown by 31 U.S.C. §1243, which requires the establishment of a trust fund to receive Federal Revenue Sharing payments, as well as "an independent audit of [the recipient's] financial statements conducted for the purpose of determining compliance with this chapter. . . not less often than once every 3 years." Further record-keeping and auditing regulations are set out in 31 C.F.R. §§51.100-51.108. Pursuant to 31 C.F.R. §51.108, the Director of the Office of Revenue Sharing, which operates within the Office of the Secretary of the Treasury, "may require the chief executive officer of a recipient government to submit a copy of its audit reports at such times as he may request."

Yet another indication of retained federal control over Federal Revenue Sharing Funds is the provision for actions to require repayment of such funds for failure of the recipient government to comply with the Act. *See* 31 C.F.R. §§51.204-51.225.

A different, yet very significant, aspect of federal interest in

these funds is set out in 31 C.F.R. §§51.73, which provides in part as follows:

> (a) The Director [of the Office of Revenue Sharing] shall have jurisdiction over any program of activity for purposes of this subpart for as long as a recipient government retains ownership or possession of any real or personal property or any interest therein, which was purchased *in whole or in part* with entitlement funds. . . (Emp. added).

The reach of the regulation to property purchased in part by Federal Revenue Sharing Funds suggests strongly that comingling of funds from other sources with Federal Revenue Sharing Funds was not intended to exhaust the proprietary interest of the United States in either the funds or property bought with them. §51.73(d) also sets out its own record-keeping requirements concerning property purchased using Federal Revenue Sharing Funds.

A final strong index of continuing federal proprietary interest in Revenue Sharing Funds is set out in 31 U.S.C. §1265, a section added to the original Act by the 1976 Amendments. Section 1265 provides for a study and evaluation of "the American Federal fiscal system in terms of the allocation and coordination of public resources. . ." That such a study would be mandated in the Act indicates the substantial federal interest underlying the whole Revenue Sharing program. The section goes on to outline a study the scope of which is wholly inconsistent with a theory suggesting complete release of ownership and control by the national government of Federal Revenue Sharing Funds.

The requirements and restrictions set out by the statutes and regulations noted above support what seems to this court to be a common-sense attitude of public policy. Stated differently, there

can hardly be any legitimate public interest served by depriving Federal Revenue Sharing Funds from the protection of §641.[4]

Thus, on the basis set out above, the court concludes that the federal government exercises sufficient supervision and control over Federal Revenue Sharing Funds to bring those funds within the meaning of "money. . .of the United States" as used in 18 U.S.C. §641.

3. As alleged in Count 1, the defendant did embezzle, steal, purloin and knowingly convert to his own use money having a value in excess of $100.00, the goods and property of the United States.

4. The court therefore finds the defendant guilty of Count 1 of the Indictment.

5. While the defendant did embezzle, steal, purloin and knowingly convert to his own use public funds as alleged in Counts 2 through 6, those funds have not been proved beyond a reasonable doubt to have been money of the United States.

6. The court therefore finds the defendant not guilty of Counts 2 through 6.

AND IT IS SO ORDERED.

Charles E. Simons, Jr.
United States District Judge

Aiken, South Carolina
April 20, 1983

[4]In this vain, the court notes that 31 C.F.R. §51.41, which describes permissible expenditures for local governments, provides in part that "[a]fter January 1, 1977, a recipient government may expend its entitlement funds for any purpose permissable under State or local law." While it is not clear to the court that §51.41 had been promulgated in this form at the time of the acts of embezzlement described in Count 1, such acts can hardly be said to be permissable under the laws of South Carolina. Apart from the foregoing portion of §51.41, the regulations cited throughout this Order reflect the provisions of C.F.R. Title 31 as it existed during the period covered by Count 1.